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In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY D. GORTMAKER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Is a criminal defendant denied due process of law when the special grand jury which indicts him is selected, in substantial compliance with state law, from among the members of a jury array who have remained in attendance upon the court through a prolonged term of jury duty, and when the selection process did not discriminate against any constitutionally recognized class of people, or result in the empaneling of any grand jurors with actual bias or prejudice in the matter under investigation?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent accepts petitioner's designation of the opinions below, but adds that the opinion of the Oregon Supreme Court is reported unofficially at 668 P.2d 354.

JURISDICTION

Respondent accepts petitioner's statement of the dates alleged to be material to the petition in this case as an accurate statement of the dates in question. Respondent denies that the petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the constitutional provisions alleged to be involved in this case as an accurate statement of those provisions. Respondent denies that those provisions were invoked or relied upon, in or by the Oregon appellate courts.

STATEMENT OF THE CASE

Respondent accepts petitioner's "Summary of Facts" (Petition at 4-7).

Respondent rejects petitioner's statement of the "Procedural History" of this case (Petition at 7-10), and submits the following instead.

In the state trial court, Gortmaker cited the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in his motion to quash or dismiss the indictments against him, on the basis of irregularities in the grand jury selection process. His precise objections were that the selection process excluded people who knew him, and that the grand jurors were selected from the jury array summoned for the wrong term of the court. (*See* Petition at 68-69).

Gortmaker did not pursue these specific claims on appeal. Rather, as the Oregon Supreme Court noted (Petition at 20, 295 Or. at 507, 668 P.2d at 355), he complained that the grand jury selection process violated Oregon law, because (1) grand jurors had been selected, allegedly improperly, from a petit jury panel, (2) the trial court administrator had abused her authority in excusing prospective grand jurors, and (3) some grand jurors had not been "selected by lot from among all the jurors in attendance at the court," as required by the Oregon Constitution. Gortmaker cited no provisions of the federal Constitution, and made no argument based on the federal Constitution, in either the Oregon Court of Appeals or the Oregon Supreme Court.

REASONS FOR DENYING THE WRIT

(1) The petition is not timely filed, because Gortmaker erroneously computed the time for filing his petition from the Oregon equivalent of the date of the issuance of the mandate, not from the date of the denial of rehearing by the Oregon Supreme Court.

As Gortmaker indicates (Petition at 2), the Oregon Supreme Court denied his petition for rehearing in this case on September 20, 1983. He filed his petition for certiorari on December 12, 1983, 83 days after his petition for rehearing was denied. Rule 20.1 of this Court's Rules requires that a petition for certiorari to review the judgment in a criminal case of a state court of last resort be filed within 60 days after the entry of such judgment. Gortmaker's petition for certiorari is, therefore, untimely.

Gortmaker contends (Petition at 2) that the Oregon Supreme Court's order denying rehearing was not formally issued until October 11, 1983, and that, therefore, October 11 is the date from which the time for filing his petition should be computed. As is evident from the order reproduced at page 62 of Gortmaker's petition for certiorari, the "final order" which was issued on October 11 is the Oregon Supreme Court's equivalent of a mandate, not its substantive decision on rehearing. The date such an

order issues is not the date from which the time for filing a petition for certiorari runs. Rule 20.4. See Stern & Gressman, *Supreme Court Practice* § 6.3 (5th ed. 1978) [hereinafter cited as "Stern & Gressman"].

(2) The petition is not timely filed, because Gortmaker erroneously failed to mail his petition on or before the 60th day after the date from which even he computed the time for filing the petition.

Even if Gortmaker were correct in his belief that the time for filing his petition for certiorari did not begin running until October 11, 1983, his petition still would be untimely. The 60th day after October 11, 1983, was Saturday, December 10, 1983. Gortmaker did not file his petition for certiorari until Monday, December 12, when he mailed his petition to the Court, ostensibly pursuant to Rule 28.2. His petition is, therefore, two days late, even according to his own understanding of the date from which the time for filing his petition should be computed.

Gortmaker seems to have assumed that when the last day for filing a document in this Court falls on a Saturday, the document need not be filed until the following Monday, as is the rule in the Oregon state courts. Unfortunately for him, that assumption is not correct. Rules 1.2, 29.1; Stern & Gressman § 6.1, at 385.

We recognize that even if our understanding of the Court's rules is correct, the mere fact that Gortmaker's petition is untimely filed does not deprive the Court of jurisdiction to consider it. *See Schacht v. United States*, 398 U.S. 58, 63-65 (1970) (construing the predecessor of present Rule 20.1 in a federal criminal case); Stern & Gressman § 6.1, at 389-394. We submit, however, that Gortmaker's petition does not show any compelling reason for overlooking its untimeliness, and that the untimeliness of his petition is, therefore, a valid reason for denying it.

(3) The petition fails to demonstrate, and cannot, in fact, demonstrate, that the federal questions presented in the petition were raised and decided in the Oregon appellate courts.

At page 11 of his petition, Gortmaker complains that the Oregon Supreme Court "failed to consider whether federal constitutional standards were compromised" by the manner in which the grand jury which indicted him was selected. We agree that neither the Oregon Court of Appeals nor the Oregon Supreme Court considered the federal constitutional implications, if any, of the grand jury selection procedures followed in Gortmaker's case.

However, Gortmaker has only himself to blame for the Oregon appellate courts' failure to consider the federal constitutional questions urged in his

petition for certiorari. As our statement of the case indicates, Gortmaker did not *ask* the Oregon appellate courts to consider the federal constitutional implications of his contentions on appeal. Consequently, there is no federal question raised or decided in the judgment he asks this Court to review. Indeed, Gortmaker's very failure to indicate, in his petition for certiorari, how the federal questions he asks this Court to review were raised and passed upon the Oregon Supreme Court is a tacit acknowledgment that he did not, in fact, raise those questions in the Oregon appellate courts.

Gortmaker seems to think (*see* Petition at 8) that raising a federal constitutional question in the state trial court is enough to give this Court jurisdiction to review the subsequent decision of the state court of last resort in the case, whether or not the federal question was presented to that court, or passed upon by it. This, of course, is not the law. *See Hiawasse Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 343-344 (1920); Stern & Gressman § 3.27 at 218. Moreover, as our statement of the case indicates, Gortmaker's constitutional claims in the trial court were not the same as those he now asserts in his petition for certiorari.

(4) The federal questions presented in this petition would not be substantial enough to warrant review, even if they were properly raised.

In the Oregon appellate courts, Gortmaker's appeal presented a colorable question as to whether the procedure followed in selecting the grand jury which indicted him complied with the constitution and statutes of Oregon. Now, however, the Oregon Supreme Court has held that the special grand jury which indicted Gortmaker was selected in substantial compliance with state law; and the state supreme court's decision on that matter is final. As a result, the only federal question which might have remained for this Court to decide, if the question had been preserved below, is whether Gortmaker was denied due process of law by the grand jury selection procedure followed in his case.

As indicated above, any federal question concerning the selection of the grand jury which Gortmaker arguably raised in the state trial court was not pursued on appeal, and therefore is not properly before this Court. However, even if any such question had been preserved, it would not be substantial enough to warrant review. The grand jury which indicted Gortmaker was selected in substantial compliance with state law. The procedures followed are not claimed to have discriminated against any constitutionally recognized class of people, unlike,

for example, the systematic exclusion of blacks which was involved in *Rose v. Mitchell*, 443 U.S. 545 (1979). Nor was there any showing—or, indeed, any claim, beyond sheer innuendo of the kind set forth at pages 13-14 of Gortmaker's petition—that the procedures resulted in the selection of grand jurors who were actually biased or prejudiced in the matter under investigation. *Cf. Beck v. Washington*, 369 U.S. 541 (1962). To the contrary, Gortmaker generally avoided such innuendo below, as the Oregon Supreme Court noted in its opinion in this case. *See* Petition at 24, 295 Or at 510, 668 P.2d at 357. The facts of this case simply do not even suggest the existence of a federal constitutional question substantial enough to warrant this Court's attention.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

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